**Before the**
**Federal Communications Commission**
**Washington, D.C.**

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| In the Matter of | ) | |
| | ) | |
| Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies | ) | WT Docket No. 16-421 |

# REPLY COMMENTS OF AT&T


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April 7, 2017

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# REPLY COMMENTS OF AT&T

AT&T provides these reply comments in response to the Public Notice released by the Federal Communications Commission ("Commission") on streamlining deployment of small cell infrastructure by improving state and local wireless facilities siting policies.[1]

## I. INTRODUCTION AND SUMMARY

The record reveals that certain state and local regulations substantially impede deployment of wireless facilities around the country, particularly in public rights-of-way ("ROW") and on structures located in ROWs. Those regulations not only delay deployment of small cell facilities, but burden those deployments with unreasonable conditions and excessive fees, all of which create formidable barriers to broadband expansion. This Commission has made clear that it is committed to maintaining the United States' leadership role in mobile broadband services and clearing regulatory underbrush that could delay or impede the deployment of fifth generation ("5G") wireless networks. State and local measures that unnecessarily burden small deployments are having that very effect. 5G networks will require massive small cell deployments, and wireless providers are already gearing up their networks by deploying small cell facilities in ROWs and on

[1] Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421, *Public Notice*, 31 FCC Rcd 13360 (2016) ("*Public Notice*").

utility and municipal poles in ROWs. Thus, prompt Commission action under Sections 253 and 332 of the Communications Act[2] and Section 6409 of the Middleclass Tax Relief and Job Creation Act[3] is necessary.

Some state and local governments maintain that the Commission lacks authority under those provisions based on the theory that their actions are "proprietary" rather than "regulatory" or "governmental." This is nonsense. ROWs are held in trust for the benefit of the public, giving local governments a legal duty to *regulate* the time, place and manner of their use. Those regulations are the reason for this docket and the need for Commission action. Sustaining local government regulatory action by categorizing it as "proprietary" would effectively rewrite Section 253, allowing municipalities complete liberty to prevent wireless facilities in the ROW or to impose unreasonable conditions and exorbitant fees for ROW access.

AT&T agrees with wireless industry commenters that a "significant gap" in radiofrequency ("RF") coverage should not be required to show that a local decision has "the effect of prohibiting service" under Section 332(c)(7)(B)(II). Instead, the Commission should clarify that local government decisions have "the effect of prohibiting" the provision of personal wireless service under Section 332(c)(7)(B)(II) if they "materially inhibit or limit the provision of service," the same meaning the Commission attributes to the phrase in Section 253(a). Consistent interpretations would minimize confusion and account for the evolution of network technology and the paradigm shift from RF coverage to service quality.

[2] 47 U.S.C. §§253, 332.

[3] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, §6409 (2012) (codified at 47 U.S.C. § 1455).

AT&T also supports wireless commenters that propose reducing to 60-days the Section 332 shot clock for government action on facility siting requests. This change would minimize the chance of confusion and streamline small cell collocations on poles in the ROW, which typically are covered by Section 332(c)(7) rather than Section 6409 because they do not already support wireless equipment. Those collocations require no more scrutiny than collocations on existing wireless structures covered by Section 6409. Alternatively, the Commission can remove this artificial distinction between collocations covered by Section 6409 and Section 332 by redefining the term "existing base station" in Section 6409 to include all existing structures in the ROW, even if they do not already support wireless equipment.

The record further makes clear that state and local governments must be more transparent with respect to the fees imposed for ROW access. Section 253(c)'s "publicly disclosed" requirement means that local government entities must unilaterally reveal ROW compensation on their website, in a printed schedule, or some other readily available means, irrespective of whether there has been an open records act request. Readily available information on ROW pricing would allow wireless providers to evaluate the financial impact of deploying small cell facilities in the ROW early in the network design stage, compare deployments in different locales, and confirm compliance with Section 253(c)'s competitive neutrality and nondiscrimination requirements.

The Commission also should interpret Section 253 in a manner that would allow for the placement of "small cell facilities" (within reasonable volumetric limits) on all ROW structures without restriction, other than those narrowly tailored to address legitimate historic preservation and safety considerations. Small cell facilities have minimal impact, if any, on nearby properties and the communities in which they are located. The Commission has recognized this fact. The

Commission has also found that the addition of small cell facilities to utility poles in the ROW is consistent with their existing use, a finding that applies equally to municipal poles.

State and local government commenters ask the Commission to forego action due to concerns about the placement massive towers in the ROW. But, the wireless industry does not seek that relief in this docket. Instead, wireless industry commenters seek a modest increase in pole size as needed to accommodate small cell facilities. Utility and municipal poles in the ROW are not uniform. Consequently, slightly larger replacement poles would be comparable to other poles in the ROW, with no greater hazard. To that end, the Commission should clarify that Sections 253 and 332 would preempt local regulations that prevent replacement poles that are either 50 feet or less above ground level or 10 feet higher than the highest pole or other structure within 500 feet in the ROW, whichever is greater. This minimal allowance is consistent with legislation that has been adopted or is under consideration in many states and would harmonize Sections 253 and 332 with Section 6409, which allows collocations on towers and base stations that are modified to not substantially change its physical dimensions.

## II. DISCUSSION

### A. The record justifies Commission interpretation of Sections 253 and 332.

#### 1. Industry commenters paint a vivid picture of overreach by some state and local governments.

State and local government commenters argue that the record does not justify a declaratory ruling to interpret Sections 253 or 332.[4] To the contrary, wireless providers, tower companies, and

[4] *See, e.g.*, Comments of the Nat'l Ass'n of Regulatory Utility Commissioners ("NARUC Comments"), WT Docket No. 16-421 at 4-5 (filed March 8, 2017); Comments of The League of Arizona Cities and Towns, League of California Cities, California State Ass'n of Counties, New Mexico Municipal League, League of Oregon Cities, and SCAN NATOA, Inc., WT Docket No. 16-421 at 30 (filed March 8, 2017)("Western States Comments"); Comments of the City of Henderson, NV, WT Docket No. 16-421 at 2 (filed March 8, 2017)("Henderson Comments");

industry trade groups build an abundant record of overreaching by too many state and local governments, resulting in delayed and burdensome deployment processes, unreasonable restrictions on ROW access, and excessive ROW fees. T-Mobile explains that due to the application of excessive local processes designed for macro facilities, "[i]t is not uncommon for it to take two years or more from small cell project initiation to completion."[5] Sprint explains that "[l]ack of access to [ROW] structures, excessive fees, and untenable processes and delays from local governments for permitting and installing small cells have become a major barrier to investment in the mobile economy."[6] Verizon states that "many local jurisdictions today force carriers to negotiate a minefield of delays, overly burdensome requirements, and excessive fees to gain access to municipal [ROWs], place facilities on municipally-owned poles, and get zoning approval for small wireless facilities."[7] And, the Competitive Carrier Association states that its members' experience with state and local siting is "with few exceptions, marked by unreasonable delays, inflated fees unconnected to actual administrative or human resource costs, and a total disregard for 'shot clocks' and review timelines."[8]

Crown Castle explains how jurisdictions discriminate against wireless installations in the ROW vis-à-vis electric and telephone utilities.[9] WIA agrees, observing that its "members are

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Comments of the City of Austin, TX, WT Docket No. 16-421 at 3 (filed March 8, 2017).

[5] Comments of T-Mobile USA, Inc., WT Docket No. 16-421 at 4-8 (filed Mar. 8, 2017)("T-Mobile Comments").

[6] Comments of Sprint Corp., WT Docket No. 16-421 at i (filed Mar. 8, 2017).

[7] Comments of Verizon, WT Docket No. 16-421 at 3 (filed Mar. 8, 2017)("Verizon Comments").

[8] Comments of The Competitive Carriers Ass'n, WT Docket No. 16-421 at 6 (filed March 8, 2017)("CCA Comments").

[9] Comments of Crown Castle Int'l Corp., WT Docket No. 16-421 at 14-19 (filed March 8,

repeatedly faced with processes, requirements, limitations, and fees that are not imposed on other telecommunications providers (or even electric utilities) that install similar facilities in the public [ROW]."[10] Each of these (and many other) commenters heavily weight the record with numerous and consistent examples evidencing these unreasonable barriers to deployment.[11]

Even comments filed by state and local governments reveal an extensive patchwork of disparate regulations, often premised on macro facility deployments. Some government commenters discriminate against wireless providers seeking to access the ROW relative to other users of the ROW.[12] Other local governments use ROW access as a revenue source.[13] Still other

2017)("Crown Castle Comments").

[10] Comments of the Wireless Industry Ass'n, WT Docket No. 16-421 at 2 (filed March 8, 2017)("WIA Comments").

[11] Wireless industry commenters recognize the legitimate role of local governments to enforce generally applicable and non-discriminatorily applied building and safety codes. But, few of the barriers imposed by state and local governments on small cell deployments in the ROW are reasonably related to *bona fide* safety concerns implicating these codes.

[12] Comments of the Cities of San Antonio, TX; Eugene, OR; Bowie, MD; Huntsville, AL; and Knoxville, TN, WT Docket No. 16-421 at 14 (filed March 8, 2017)("San Antonio Comments"); Comments of the City of Springfield, OR, WT Docket No. 16-421 at 2 (filed March 8, 2017)("Springfield Comments"); Comments of the Texas Municipal League, WT Docket No. 16-421 at 17 (filed March 8, 2017)("Texas Municipal League Comments") (" A city *is not required to lease city property*, facilities, infrastructure to a wireless provider.").

[13] *See, e.g.*, Comments of the City and County of San Francisco, CA, WT Docket No. 16-421 at 10 (filed March 8, 2017)("San Francisco Comments")("[W]ith tightening City budgets, [agencies] view these programs as a way to obtain needed revenues to fund their core programs . . . ."); Comments of the Virginia Dept. of Transportation, WT Docket No. 16-421 at 4 (filed March 8, 2017); Comments of the City of Alexandria, VA, and the Counties of Arlington, Fairfax and Henrico, VA, WT Docket No. 16-421 at 56-60 (filed March 8, 2017)("Virginia Local Gov't Comments"); Comments of the Nat' League of Cities, the Nat'l Ass'n of Telecommunications Officers and Advisors, the Nat'l Ass'n of Towns and Townships, the Nat'l Ass'n of Counties, the Nat'l Ass'n of Regional Councils, and the Gov't Finance Officers Ass'n, WT Docket No. 16-421 at 17-25 (filed March 8, 2017) ("Nat'l Ass'n Comments").

local governments require camouflage for wireless facilities.[14] This mix of ill-fitting requirements materially inhibit and limit the provision of 5G services by discouraging investments in small cell facilities that are required to densify wireless networks in the manner needed to support 5G technologies.[15] They also suppress competition by deterring (and in some cases preventing) wireless providers from building the facilities required to offer competitive service.

**2. The Commission should move swiftly to break the status quo.**

Many local governments seek to preserve the status quo, citing a history of working with members of the wireless industry on cell site placement. The wireless industry and local governments, in fact, have worked closely for decades on cell site deployment, even when municipal action (or inaction) deviated from the spirit or letter of Section 6409 or Sections 253 or 332. And AT&T has no doubt that these working relationships will continue. But the record makes clear that these relationships do not necessarily prevent local governments from insisting on unreasonable terms and conditions that impede deployment of small cell facilities. Federal measures under the Commission's statutory authority are necessary to prevent such broadband-impeding actions.

Indeed, the growing need for massive small cell deployments – not only to support 5G networks, but also to address 4G LTE macro site spectrum exhaustion – necessitates immediate federal action. Simply put, the regulatory status quo is no longer tenable given today's

[14] *See, e.g.,* Comments of the Town of Colonie, NY, WT Docket No. 16-421 at 2 (filed March 8, 2017); Henderson Comments at 2, 3.

[15] To their credit, some states require cost-based ROW access fees. S*ee, e.g.*, Comments of the Village of Johnstown, OH, WT Docket No. 16-421 at 3 (filed March 8, 2017)("Under our state code, we can only charge for actual and direct costs."); Comments of the City of New Albany, OH, WT Docket No. 16-421 at 7 (filed March 8, 2017)("By requiring [ROW] fees to be based on costs incurred and be demonstrable, Ohio law clearly promotes the "'fair and reasonable' for localities' expenses" that Mobilitie requests in its Petition.").

infrastructure requirements. As Chairman Pai has recognized: "Future 5G technologies will require 'densification' of wireless networks. That means providers are going to deploy hundreds of thousands of new antennas and cell sites, and they are going to deploy many more miles of fiber to carry all of this traffic. Without a paradigm shift in our nation's approach to wireless siting and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back."[16]

Local government commenters attempt to downplay this need for immediate action,[17] but the record belies their arguments. Wireless providers and infrastructure companies are already building small cell facilities and planning for more. Even small cell facilities in the ROW that initially facilitate 4G service enhancements will in the near future act as the foundation for 5G millimeter wave networks. And contrary to the claims of some local government commenters, wireless providers do not have other deployment options.[18] Small cell facilities "must be deployed more densely—i.e., in many more locations—to function effectively,"[19] making ROWs and their inventory of densely spaced, low-elevation vertical structures as the only predictable, reasonably available locations to deploy small cell facilities that will support 5G networks.

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[16] Remarks of FCC Commissioner Ajit Pai, Remarks at the Brandery: A Digital Empowerment Agenda Cincinnati, OH, at 2 (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf.

[17] *See, e.g.,* Virginia Local Gov't Comments at 2 ("It would be unreasonable for the Commission to adopt a national regulatory scheme for a technology that is barely beginning to be deployed, without allowing state and local governments time to adapt.").

[18] Western States Comments at 7; Comments of the City of Houston, TX, WT Docket No. 16-421 at 10 (filed March 8, 2017)("Houston Comments").

[19] *Public Notice,* 31 FCC Rcd at 13360.

### B. Local government actions to regulate use of ROW and ROW poles are subject to Section 253 and 332 scrutiny as "proprietary" actions.

Many municipalities argue that their actions to restrict small cell deployments in ROW and on municipal and utility poles in ROW are insulated from Sections 253 and 332 review because the local government is acting in a "proprietary," rather than a "regulatory" or "governmental," capacity.[20] These interpretations are misplaced and would undermine the goals of those provisions. Neither Section 253 nor Section 332 expressly exempt "proprietary" local government actions from their scrutiny. To the contrary, Sections 253 and 332 extend to actions that prohibit or have the effect of prohibiting service regardless of how a local government categorizes its actions. Nevertheless, some federal courts have distinguished between "regulatory" and "proprietary" actions.[21] To provide guidance to the wireless industry, local governments, and federal courts, the Commission should clarify that state and local governments necessarily act in their "regulatory" or "governmental" capacity when they impose policies and fees for access to ROWs.[22]

"[N]ot all municipal action regarding public property [a municipality] 'owns' is automatically 'proprietary.'"[23] Whereas most municipally-owned property, like parks, land, or buildings, can be used by the municipality as owner for any reasonable purpose, ROWs are "legally distinguishable" because they are held in trust for the benefit of the public (i.e., to provide public

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[20] *See, e.g.,* San Francisco Comments at 19; NARUC Comments at 7; Springfield Comments at 4; San Antonio Comments at 14-15.

[21] *See, e.g., Sprint Spectrum L.P. v. Mills,* 283 F.3d 404, 421 (2d Cir. 2002).

[22] *See, e.g., NextG Networks of N.Y., Inc. v. City of New York,* 2004 WL 2884308 (S.D.N.Y. 2004)(City's action to implement a scheme for placement of wireless equipment on poles in the ROW were "taken pursuant to regulatory objectives or policy").

[23] CCA Comments at 28.

services).[24] "This 'trust' . . . confers a legal duty upon municipal governments to *regulate*, maintain, operate, and oversee the public [ROW]."[25] Municipalities cannot shield themselves from Sections 253 and 332 by simply characterizing their actions as proprietary.[26] If they could, no state and local action impacting the ROW or poles in the ROW would be subject to Sections 253and 332(c)(7), leaving state local governments free to discriminate at will, charge exorbitant fees, block ROW access at their discretion, and otherwise act in ways that deviate from the spirit and letter of those statutory provisions.

### C. Section 253 is the proper vehicle for the Commission to rein in municipal barriers to small cell deployment.

Many government commenters also claim that Section 332(c)(7)(A) is the sole avenue of relief against a local government's action to regulate the placement of personal wireless service facilities, to the exclusion of Section 253.[27] This interpretation ignores the Commission's preemption authority under Section 253(d) and has been rejected by the courts.[28] "Where [Section] 253 provides a cause of action against *local regulations*, [S]ection 332 gives a cause of action

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[24] Comments of the Pennsylvania State Ass'n of Boroughs, the Pennsylvania Municipal League, the Pennsylvania State Ass'n of Township Supervisors, the Pennsylvania State Ass'n of Township Commissioners, the City of Philadelphia, the City of Pittsburgh, *et al*, WT Docket No. 16-421 at 2 (filed March 8, 2017) ("Pennsylvania Government Comments")("Legally distinguishable from municipally-owned property (i.e., tracts of land assigned a parcel numbers) and open spaces (i.e., parks and other recreational areas), public rights-of-way are held in trust by municipal governments for the use and enjoyment of their residents.").

[25] *Id.*

[26] CCA Comments at 28 (citing *Sprint Spectrum L.P. v. Town of Durham*, 1998 U.S. Dist. LEXIS 23941, *1, *19-*20 (D.N.H. 1998)).

[27] San Francisco Comments at 17; San Antonio Comments at 11-12.

[28] *Cox Commc'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002); *USCOC of Greater Mo., L.L.C. v. Village of Marlborough*, 618 F. Supp. 2d 1055, 1065 (E.D. Mo. 2009).

against *local decisions.*"[29] Thus, Section 332(c)(7) supplements rather than displaces Section 253(a).[30] Section 253 is, in fact, the appropriate vehicle for Commission action to preempt unreasonable local government regulation and should be recognized as such.

**D. The Commission should harmonize the Section 332 and Section 6409 shot clocks.**

CTIA correctly observes that the "Commission should interpret Section 332(c)(7) to adopt a 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna."[31] Since the Commission adopted the Section 332(c)(7) shot clock on government action on a facility siting request − 90 days for collocations and 150 days for other sites[32] − the wireless industry has increasingly focused on small cell facilities. Moreover, the Commission has determined that "a 60-day period of review . . . is appropriate to provide municipalities with sufficient time to review applications for compliance with Section 6409(a)."[33] Yet, the Section 332(c)(7) shot clock has not evolved. Harmonizing the Section 332(c)(7) and Section 6409 shot clocks will reduce the chance for confusion among industry and local governments, with little to no impact on local government review.

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[29] *Cox Commc'ns PCS, L.P.*, 204 F. Supp. 2d at 1277.

[30] *See, e.g.,* Verizon Comments at 22.

[31] Comments of CTIA—The Wireless Ass'n, WT Docket No. 16-421 at 34 (filed March 8, 2017).

[32] Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009).

[33] Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *et al.*, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32, *Report and Order,* 29 FCC Rcd 12865, 12957 (2014) ("*2014 Infrastructure Order*").

Collocating small cell equipment on a pole in the ROW – typically subject to the 90-day shot clock under Section 332(c)(7) – is substantially the same and requires a similar review as collocating wireless equipment on a tower or base station, which is subject to a 60-day shot-clock under Section 6409. Compared to traditional macro collocations on towers and base stations, a small cell facility collocation on poles in the ROW will involve physically smaller equipment and similar, if not less extensive, construction and present less of an aesthetic concern and little to no ground disturbance. Local government appeals for additional time to review small cell installations on poles in the ROW are unconvincing, as those concerns are not applied equally to other attachments on poles in the ROW. Sixty days is ample time for localities to issue a permit for small cell facilities, a window of time through which many municipalities admittedly can fit.[34]

**E. The Commission should harmonize the Section 253 and 332 analyses.**

AT&T agrees with Verizon that the Commission should "construe Sections 253 and 332 in harmony" and reject the "significant gap" test adopted by some courts to demonstrate when local government action has the "effect of prohibiting" the provision of service under Section 332(c)(7)(B)(II).[35] Given their identical statutory language, the Commission should apply the same standard to Section 332(c)(7)(B)(II) as it does to Section 253(a) − local government action

[34] *See, e.g.*, Comments of the City of Rochester, NY, WT Docket No. 16-421 at 2 (filed March 8, 2017)("Rochester Comments")(permits issued within days or a couple of weeks); Henderson Comments at 3-4 (approval within 60 days or less; small cell deployments processed within 45 days); Houston Comments at 3-4 (review "usually takes 2 weeks, but no more than 30 days"); Comments of the City of Delaware, OH, WT Docket No. 16-421 at 2 (filed March 7, 2017) (ROW permits processed within 1-2 weeks); Comments of the Village of Schaumburg, IL, WT Docket No. 16-421 at 3 (filed March 8, 2017)(15 permits issued within 30 days).

[35] Verizon Comments at 20-22. *See, e.g.*, MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 733 (9th Cir. 2005); T-Mobile USA, Inc. v. City of Anacortes, N.M., 572 F.3d 987, 995 (9th Cir. 2009); T-Mobile Central, LLC v. Charter Township of West Bloomfield, 691 F.3d 794, 805-06 (6th Cir. 2012).

has the "effect of prohibiting" the provision of service when it "materially inhibits or limits" a wireless provider's ability to provide service.

The "significant gap" test deviates from the letter and the spirit of Section 332. Industry evolution, technology, and consumer demand now differentiate wireless providers based on capacity, throughput, and reliability, not solely on RF coverage. Neither local governments nor courts are positioned to substitute their judgments for the expert judgment of service providers as to how to design and deploy wireless networks to meet consumers' capacity, throughput, and reliability needs. Also, it is important to understand that 5G networks will supplement, not supplant, existing 4G networks,[36] which already provide widespread RF coverage. Thus, continued application of the "significant gap" test would materially impair 5G network deployment merely because of the presence of 4G coverage. As the expert agency, the Commission is positioned to eliminate the "significant gap" test and its adverse impact on wireless providers' ability to deploy small cell facilities that would enhance network capacity, throughput, and/or reliability. This is consistent with Congressional intent.

### F. Section 253(c) requires local governments to unilaterally disclose ROW compensation to the public.

Section 253 does not prevent state or local governments from requiring "fair and reasonable compensation" for use of the ROW if the "compensation required is publicly disclosed."[37] Nevertheless, municipalities make very little effort to disclose ROW fees, and some of them argue that they meet the disclosure requirements of Section 253(c) merely by providing compensation

[36] *See*, Samsung White Paper—5G Vision (Feb. 2015)("[W]e envision an overlaid deployment of 5G in conjunction with the existing 4G macro cells."), available at http://www.samsung.com/global/business-images/insights/2015/Samsung-5G-Vision-0.pdf (last accessed on April 2, 2017).

[37] 47 U.S.C. §253(c).

information in response to state open records act requests.[38] This interpretation would render Section 253(c) superfluous. As the City and County of San Francisco observe, "[e]very state has some sort of freedom of information act, which would require state and local governments to provide this information to . . . any person filing a proper request."[39] To have meaning, Section 253(c) must require more than merely complying with existing state freedom of information act requirements.

The most reasonable interpretation of Section 253(c) is that a local government must unilaterally disclose compensation information to members of the general public, such as on its municipal website, in a standard schedule, or, by some other readily available means. This level of transparency would allow wireless providers to budget for small cell deployments in the ROW, compare small cell deployments in different locales, and confirm that ROW compensation is "competitively neutral and nondiscriminatory" as required by Section 253(c).[40] This Commission interpretation would also promote small cell facilities by removing the significant uncertainty that currently exists when planning for their deployment.

### G. The Commission should reinterpret Section 6409 to cover collocations on all existing ROW structures.

AT&T agrees with Crown Castle and Verizon that the Commission should revise its interpretation of Section 6409 to cover all ROW structures, even those that do not already support

[38] *See, e.g.,* San Francisco Comments at 28-29; Nat'l Ass'n Comments at 26-27; Springfield Comments at 4; Rochester Comments at 4-7.

[39] San Francisco Comments at 28-29.

[40] *See Peco Energy Co. v. Township of Haverford*, 1999 WL 1240941 at *7 (E.D. Pa. 1999)("[T]he Township's failure to publish a schedule of fees is in direct violation of §253(c), which requires that 'the compensation required [must be] publicly disclosed . . . .' The failure to publicize the fees also renders us unable to determine if Haverford has complied with §253(c)'s requirement that compensation be imposed 'on a competitively neutral and nondiscriminatory basis.'").

wireless equipment.[41] Section 6409 requires local governments to approve "eligible facilities requests" that would modify an existing wireless tower or base station that does not substantially change its physical dimensions.[42] In its 2014 Infrastructure Order, the Commission defined an "existing base station" generally as a non-tower structure (including a pole) that at the time of an eligible facilities request supports wireless equipment that was previously approved through a state or local siting process.

Small cell facilities typically will be deployed on existing ROW poles, including municipal light and traffic structures, which do not meet the current definition of "existing base station" because they do not already support wireless equipment. Most likely, structural limitations will prevent those structures from supporting more than one wireless provider's equipment unless they are modified or replaced. These factors preclude application of Section 6409 for most small cell deployments. Yet, Congress passed Section 6409 to "promote the deployment of the network facilities needed to provide broadband wireless services."[43] This goal and the Commission's effort to encourage collocations on non-tower structures, and the evolving nature of wireless networks, warrant revising the definition of "existing base station" to encompass all ROW structures.

### H. The Commission should interpret Sections 253 and 332 to allow for small cell placement on existing or replacement ROW poles.

Despite admonitions from local governments, the Commission can and should interpret Sections 253 and 332 in a manner that both facilitates small cell deployment and responds to municipal concerns that massive facilities, such as new towers, will be built under the guise of

[41] Crown Castle Comments at 38-39; Verizon Comments at 29.

[42] 47 U.S.C. §1455(a)(1).

[43] Accelerating Broadband Deployment by Improving Wireless Facilities Siting Policies *et. al*, *Report and Order,* WT Docket No. 13-238, WT Docket No. 11-59, WT Docket No. 13-32, 29 FCC Rcd. 12865, 12923 (2014)("*2014 Infrastructure Order")*.

small cell facilities. To meet that objective, the Commission should interpret Section 253 to preempt local ordinances that, absent legitimate historic preservation and safety considerations, materially inhibit or limit the placement of small cell equipment that fits within the volumetric limits in the *First Amendment to Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*[44] on existing and replacement poles in the ROW, including municipally-owned poles.

The Commission has correctly concluded that the addition of small cell facilities to utility poles in the ROW is "fully consistent with their existing use"[45] and that small cell facilities which fit within reasonable volumetric limits have a minimal to no adverse impact on nearby properties.[46] The Commission should recognize that these conclusions extend equally to the placement of small cell equipment on municipally-owned poles in the ROW because, like utility poles, they also support a variety of equipment in addition to street lights and traffic lights, such as Wi-Fi access points, pedestrian crossing systems, cameras, solar panels, banners, and a myriad of other signs and attachments. The addition of small cell facilities to these municipally-owned poles is neither unexpected nor particularly impactful.

Some state and local government appeal for the Commission to forego action in this docket because of concerns about the placement of massive towers in the ROW.[47] The wireless industry does not seek relief to place massive towers in the ROW. Instead, in this docket the wireless

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[44] First Amendment to Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, *Public Notice*, WT Docket No. 15-180, 31 FCC Rcd 8824 (2016).

[45] *2014 Infrastructure Order*, 29 FCC Rcd. at 12907.

[46] *Id.*

[47] Texas Municipal League Comments at 20; Pennsylvania Gov't Comments at 8-9; Western States Comments at 14-15; Nat'l Ass'n Comments at 11-12; Rochester Comments at 3.

industry seeks a modest increase in pole size as needed to accommodate small cell facilities, which would have a minimal impact on the community. Utility and municipal poles in the ROW are not uniform. Slightly larger replacement poles would be consistent with ROW use and be comparable to existing poles, with no greater hazard to the public. The Commission should interpret Section 253 to preempt local regulations that prevent the installation of small cell facilities on modestly taller replacement poles in the ROW—poles that are no taller than 50 feet above ground level or 10 feet higher than the highest pole or other structure within 500 feet in the ROW, whichever is greater. This standard has been adopted by some states and is under consideration by others,[48] and would promote harmony with Section 6409, which requires local governments to approve eligible facilities requests that do not substantially change the physical dimensions of a supporting tower or base station. This interpretation would also substantially advance small cell deployment because many ROW poles cannot structurally support small cell facilities and must be replaced.

Small cell facilities with equipment exceeding the designated volume limit or requiring a replacement pole exceeding the height limit would require appropriate local authorization to ensure responsiveness to local concerns. And, in further recognition of local interests, the Commission's interpretation would not apply to generally applicable building, structural, electrical, and safety codes and to other laws codifying objective standards reasonably related to health and safety. These interpretations would be consistent with the treatment of collocations under Section 6409.

[48] *See, e.g.*, AZ HB 2365; OH SB 331; FL HB 687.

Dated: April 7, 2017

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